Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
U.S. Department of Justice, Federal	)	
Bureau of Investigation, and	)	
U.S. Drug Enforcement Administration	)	**RM 10865**
	)	
Joint Petition For Expedited Rulemaking	)	
To Resolve Various Issues Concerning	)	
the Communications Assistance for	)	
Law Enforcement Act	)	

COMMENTS OF WORLDCOM, INC. d/b/a/ MCI

April 12, 2004

Larry Fenster
1133 19th St., NW
Washington, D.C. 20036
202-736-6513

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I. EXECUTIVE SUMMARY

In its Petition for Declaratory Ruling and Rulemaking (*Petition*), the DOJ, FBI, and DEA ("Petitioners") claim that the development of IP-enabled communications services has compromised their ability to perform lawful surveillance. They therefore ask the Commission to issue a declaratory ruling that would substantially expand the scope of the Communications Assistance for Law Enforcement Act ("CALEA") to apply to broadband Internet access providers and broadband telephony providers; adopt statutory interpretations that would ultimately sweep all information services providers under CALEA; establish a new regulatory compliance and enforcement regime that shifts enforcement authority from the courts to the Commission; and require IP-enabled service providers to obtain pre-approval before introducing new services.

MCI acknowledges law enforcement's very substantial interest in being able to investigate and prevent crime using electronic surveillance. MCI's Internet Service Provider (ISP) business units have taken extensive measures to ensure that intercept warrants received from law enforcement have been executed efficiently and effectively, and it will continue to cooperate with law enforcement on these important matters despite their lack of CALEA obligations.

However, Petitioners seek to undermine the careful balance of interests Congress established when it passed CALEA, and place law enforcement's interest in intercept capabilities far above society's interest in rapid and continual innovation. In addition to ensuring law enforcement's ability to perform expeditious surveillance, CALEA sought to ensure society's interest in the rapid deployment of new communications services and technologies. CALEA sought to promote society's interest in rapid communication innovation, by first exempting

information service providers from CALEA, and then by narrowing the scope of its obligations on telecommunications carriers.

Congress intended all information services to be able to develop without modifying their networks or services, while still requiring them to intercept communications pursuant to Title III of the Omnibus Crime Control and Safe Streets Act (*Title III)*,[1] Electronic Communications Privacy Act (*ECPA*) ,[2] the Foreign Intelligence Service Intelligence Act (*FISA*)[3]; and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, (*USA PATRIOT Act*).[4] Congress adopted a very broad definition of information services, incorporating elements of the Commission's Computer II definition of enhanced services, and the MFJ's definition of information services. CALEA's definition of information services is arguably broader than that of the Communications Act. Congress also made the definitions of information and telecommunications services mutually exclusive, thereby reinforcing the broad scope of the information services exemption and the narrow scope of the telecommunications obligation.

Congress sought to ensure that telecommunications service providers' CALEA obligations would not hinder their ability to offer innovative telecommunications services by narrowing CALEA'S scope, by *inter alia*: 1) prohibiting law enforcement agencies from requiring telecommunications carriers to adopt specific network designs or equipment in order to

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[1] *Omnibus Crime Control and Safe Streets Act*, Pub. L. 90-251, 82 Stat. 212 (1968).

[2] *Electronic Communications Privacy Act*, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[3] *Foreign Intelligence Surveillance Act (FISA*), 50 U.S.C. §§ 1801-1862 (West 1991 and Supp. 2002)

[4] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, (*USA PATRIOT Act*), Pub. L. No. 107-56, 115 Stat. 272 (2001)

comply with CALEA; 2) exempting them from CALEA if alternative technologies for obtaining the same information were reasonably available and compliance by the carrier was not reasonably achievable; and 3) allowing telecommunications carriers to establish standards that would serve as safe harbors for compliance with CALEA's capability requirements.

Petitioners argue that the Commission may immediately bring what they term "broadband Internet access" and "broadband Internet telephony" under the purview of CALEA because its definition of telecommunications includes the term "switching," in contrast to the definition contained in the Communications Act. Obviously, there are switched telecommunications services subject to the Communications Act. Information services may also be switched without losing their character as information services. Therefore, the fact that a service may be switched has no bearing on whether it is an information service or a telecommunications service under CALEA or the Communications Act.

Petitioners also argue that because Internet access has a telecommunications component, the Commission may bring broadband Internet access under the purview of CALEA. However, all information services are defined, in part, as services offered via telecommunications. For this reason, there is no meaningful distinction between broadband Internet access, narrowband Internet access, or any other information service for purposes of CALEA. Were the Commission to utilize this rationale to apply CALEA obligations to broadband Internet access, information service providers would have no basis to abstain from bringing each of their services into CALEA compliance.

Petitioners also invite the Commission to bring broadband Internet access under the purview of CALEA by declaring that this service comprises a substantial replacement for narrowband dialup. They argue that broadband Internet access is replacing narrowband Internet

access, implying that CALEA's substantial replacement language refers to replacing narrowband Internet access. But CALEA requires a showing that a non-telecommunications service substantially replaces *local telephone service,* not narrowband Internet access. Petitioners have made no attempt to show that broadband Internet access has substantially replaced local telephone service. Petitioners also suggest that broadband Internet voice has substantially replaced local telephone service, but provide no evidence to substantiate their suggestion. Even Vonage, one of the largest IP-enabled voice service providers, currently comprises approximately .1% of local access lines.

In addition to failing to offer any evidence that either broadband Internet access or IP-based voice applications provide a substantial replacement of local exchange service, Petitioners improperly ask the Commission to forgo showing that it would be in the public interest to make such a determination. Congress intended that such a finding would be in the public interest only after considering whether it would promote competition, and encourage the development of new technologies, in addition to protecting public safety and national security.

The only manner in which services not considered telecommunications under the Communications Act might be considered telecommunications under CALEA would be subsequent to a determination by the Commission that a "service is a replacement for a substantial portion of local telephone exchange service" and that it is in the public interest to deem such a service to be telecommunications under CALEA. The Commission has yet to establish criteria to determine what would constitute a substantial replacement of local telephone exchange service; whether inclusion of such service(s) would promote competition, encourage the development of new technologies, and protect public safety and national security; and has yet to develop a record whether CALEA compliance for these service(s) is reasonably achievable.

Such determinations may only be made by the Commission after development of a full record, and are best done in the context of a rulemaking proceeding

Petitioners also ask the Commission to adopt rules requiring new services to be CALEA compliant upon service initiation, and to require carriers who may be unsure whether a new service is CALEA compliant to "file a request of clarification or declaratory ruling" before being able to offer a service. While, Congress generally expected new telecommunications facilities to be able to comply with the capability requirements for any telecommunications services offered over those facilities, Congress did not rule out the possibility that carriers would deploy facilities that could not be tapped if law enforcement had other means of achieving the needed surveillance. More importantly, this request contradicts Congress' intent to prohibit law enforcement, or the Commission, from barring the deployment of new technologies, and for this reason should not be considered in any forthcoming NPRM. For this reason, the Commission should not include pre-approval of new services in any forthcoming NPRM. Congress has already spoken to the manner in which new services may be introduced. Finally, Petitioners request the Commission issue strict rules governing CALEA enforcement. This request flows from Petitioners' belief that industry packet mode standards are inadequate due to industry's rejection of their standards recommendations. MCI respectfully submits that the facts are more complicated. Petitioners' recommendations during the deliberations leading up to the adoption of J-STD-25-B included a host of call identifying features that either went beyond existing CALEA requirements, were not reasonably achievable in an IP-environment, or explicitly applied to information services. Until and unless the Commission includes determines that IP-based services are substantial replacements for local exchange service, and specifically identifies

which such services are included, industry standards bodies should not be faulted for failing to develop standards defining capability requirements for specific information services.

More importantly, there is no statutory basis for the Commission to establish rules enforcing compliance with CALEA's capability requirements. Petitioners contend the Commission may use its plenary Section 229 authority to do this, but Congress explicitly delegated enforcement authority to courts of law. Where Congress has expressly delegated enforcement authority to the courts, the Commission may not use its plenary authority to establish enforcement rules. The Commission should exclude Petitioners' request to establish rules governing service provider compliance with CALEA's capability requirements from any rulemaking it may undertake.

Pursuant to the Commission's Section 1.405 of the Commission's Rules,[5] WorldCom, Inc., d//b/a/ MCI, hereby submits comments in response to the Joint Petition for Expedited Rulemaking ("Petition") filed by the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (Petitioners) to address various aspects of the implementation of the Communications Assistance for Law Enforcement Act ("CALEA").[6]

II. INTRODUCTION

On March 10, 2004, the U.S. Department of Justice, the Federal Bureau of Investigation and the U.S. Drug Enforcement Administration (Petitioners or *DOJ*) filed a Joint Petition for Expedited Rulemaking (*Petition*)[7] to consider a variety of issues related to the application of the Communications Assistance for Law Enforcement Act (CALEA) to IP-Enabled services, and more generally, the application of CALEA in the face of future network and service evolution.[8] The Petition contains, among other things, a Petition for Declaratory Ruling (*PDR*) requesting the Commission to determine that broadband Internet access service and telephony provided over broadband Internet connections are subject to CALEA. Petitioners contend that the absence of CALEA obligations for these Internet services is frustrating law enforcement's ability to conduct lawful surveillance. They also maintain that the Commission may bring these services

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[5] 47 C.F.R. § 1.405.

[6] *See Joint Petition for Expedited Rulemaking of United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration*, RM-10865 (filed March 10, 2004) ("*Petition*").

[7] *Joint Petition for Expedited Rulemaking ("Petition")*, U.S. Department of Justice, Federal Bureau of Investigation, U.S. Drug Enforcement Administration, filed March 10, 2004.

[8] *Communications Assistance for Law Enforcement Act of 1994*, Pub. L. No. 103-414, 108 Stat. 4279 (1994).

under the purview of CALEA in a PDR, either by means of statutory interpretation or because these services replace a substantial portion of local telephone service.

Petitioners request that the Commission rule on its *PDR* when it issues a Notice of Proposed Rulemaking to solicit comment on the other recommendations proffered in the *Petition.*[9] Those recommendations include establishing rules that would:

- apply CALEA presumptively to any service that substitutes for a service covered by CALEA;[10]
- apply CALEA presumptively to any entity providing wire or electronic communication switching or transmission service;[11]
- require service providers to file a petition seeking clarification of the potential CALEA obligations of any new service prior to its being offered;[12]
- permit the Commission to request information regarding a provider's CALEA compliance status;[13]
- establish interim benchmark compliance requirements prior to final packet mode compliance;[14]
- codify a general packet mode compliance deadline;[15]
- severely restrict the possibility of further extensions for packet mode compliance;[16]
- permit the Commission to undertake enforcement actions against carriers who fail to comply with CALEA capability requirements;[17]

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[9] *Petition* at 22.

[10] *Id.,* at 33.

[11] *Id.,* at 33.

[12] *Id*., at 34.

[13] *Id*., at 40.

[14] *Id*., at 43-47.

[15] *Id*., at 48

[16] *Id*., at 49

[17] *Id*., at 44, 47, 48, 58, 59,

MCI takes this opportunity to comment on the specific proposals and recommendations of Petitioners and offers issues the Commission should raise in any forthcoming NPRM.

III. THE PETITION FOR DECLARATORY RULING IS NOT SUPPORTED BY SURVEILLANCE NEEDS, STATUTES, OR COMMISSION DECISIONS

A. Petitioners Do Not Substantiate Their Claim That Critical Electronic Surveillance Is Being Compromised

1. Non-telecommunications carriers are required to respond to all lawful surveillance requests

Petitioners contend that the ability of law enforcement to conduct lawful interception is being compromised and will continue to be compromised until and unless the Commission brings broadband Internet access and broadband Internet voice applications under the purview of CALEA.[18]

MCI does not agree that law enforcement's surveillance abilities have been compromised as Petitioners assert. While CALEA pertains only to the network modifications telecommunications carriers must deploy, intercept requests become lawful only pursuant to other statutory authorities. These authorities include Title III of the Omnibus Crime Control and Safe Streets Act (*Title III)*, [19] Electronic Communications Privacy Act (*ECPA*) ,[20] the Foreign Intelligence Service Intelligence Act (*FISA*)[21]; and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, (*USA*

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[18] "electronic surveillance [is being] compromised today by providers who have failed to implement CALEA-compliant intercept capabilities. Communications among surveillance targets are being lost, and associated call-identifying information is not being provided in a timely manner…"*Petition* at 8.

[19] *Omnibus Crime Control and Safe Streets Act*, Pub. L. 90-251, 82 Stat. 212 (1968).

[20] *Electronic Communications Privacy Act (ECPA)*, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[21] *Foreign Intelligence Surveillance Act (FISA*), 50 U.S.C. §§ 1801-1862 (West 1991 and Supp. 2002)

PATRIOT Act).[22] These statutory authorities provide law enforcement powerful tools to perform lawful interception of targets that use services provided by telecommunications and information service providers alike, even in the absence of CALEA requirements.

2. MCI's information service business units have rapidly and comprehensively responded to surveillance requests and play an important role in enhancing national security

MCI recognizes that law enforcement agencies have a very significant interest in obtaining access to Internet communications in order to investigate and prevent crime. MCI's Internet Service Provider (ISP) business units have taken extensive measures to ensure that intercept warrants received from law enforcement have been executed efficiently and effectively, and it will continue to cooperate with law enforcement on these important matters despite their lack of CALEA obligations.

MCI has an expansive IP network and provides data and Internet services to businesses, including ISPs, state and federal government, and residential customers. MCI provides wholesale online dial-up, remote Internet access and high bandwidth dedicated Internet access. The bulk of MCI's ISP business is its Internet backbone business. MCI's ISP business has approximately 7-8 staff regularly involved in responding to law enforcement requests for intercept information, and handles approximately 500 requests a year. Requests run the gamut from subpoenas, summons, and court orders to Title III Orders. Surveillance information helpful to the prosecution of child endangerment, fraud, harassment, and terrorism is provided to the full

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[22] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, (*USA PATRIOT Act*), Pub. L. No. 107-56, 115 Stat. 272 (2001)

range of law enforcement authorities, including local agencies, the FBI, DOJ, and the Department of Defense.

As primarily a backbone provider, MCI's ISP business does not have a customer relationship with end-users, so it typically does not maintain subscriber information or customer records, but it readily provides all identifying information and content reasonably available, typically including the IP address of the destination or source host, time of connection or disconnection and an end-user's telephone number. Law enforcement officials are then able to use this information to obtain the necessary authorization to obtain surveillance information from other ISPs or telecommunications providers identified by MCI's efforts.[23]

To date, law enforcement officials appear to be quite satisfied with the expeditious and thorough manner in which MCI has responded to their surveillance requests. Recently, MCI began including a customer satisfaction survey with each subpoena response sent to law enforcement. The survey solicits comments and requests that the officer rate service on a scale of 1 – 5, 5 being "excellent." Of the 61 surveys law enforcement has returned to date, 55 are rated 5; the remaining 6 surveys received a rating of 4. MCI will continue to cooperate with law enforcement agencies with regard to future surveillance requests.

MCI takes its duties related to national security very seriously, as it provides numerous circuits devoted to first responders designated in the telecommunications service priority (TSP) program. MCI proactively trains, prepares, and develops processes necessary to ensure that first responders and crisis coordinators have the tools required to perform their job. For physical and

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[23] A recent notable example involved MCI's extensive efforts to assist the Virginia Attorney General, to identify persons involved in major violations of Virginia's Antispam Law. *See* Attachment 1, *Virginia Indicts 2 Under Antispam Law*, New York Times, December 12, 2003.

cyber-crises, MCI has numerous processes in place to facilitate communication and coordination with first responders and crisis coordinators at the federal, state, and local level.

MCI also has full-time staff at the Department of Homeland Security (DHS) National Coordination Center ("NCC") to provide consistent and immediate responses to emergency and catastrophic situations for local, state, and/or federal crises. NCC is DHS' focal point for telecommunications issues, and coordinates industry-wide responses of telecommunications and cyber incidents during a crisis. The NCC process allows federal, state, or local officials to have a single point of contact within MCI for emergency assistance and emergency status information available on a 24x7 basis.

MCI also routinely participates in a number of National Security Telecommunications Advisory Council ("NSTAC") task forces. NSTAC, which was created by Executive Order in 1982, provides industry-based advice and expertise to the President on issues and problems related to implementing national security and emergency preparedness ("NS/EP") communications policy. NSTAC advises the President and Secretary of Homeland Security on a wide range of policy and technical issues affecting communications, information systems, information assurance and critical infrastructure protection.

In summary, MCI's ISP units have cooperated fully and expeditiously with law enforcement, even without CALEA requirements, and will continue to do so with respect to each of its IP-based services.

B. CALEA Exempts Information Service Providers And Narrowly Focuses Telecommunications Carriers' Obligations In Order To Ensure Innovation

1. Prior to CALEA, Congress balanced privacy interests against the needs of law enforcement

Prior to the passage of CALEA in 1994, Congress enacted electronic surveillance legislation that sought to balance privacy interests and the needs of law enforcement. In 1968, *Title III* authorized the use of electronic surveillance pursuant to a court order, thereby protecting the privacy of wire and oral communications and establishing the conditions under which their interception was lawfully permitted. In 1986, *ECPA* extended these same privacy and law enforcement interests to electronic communications such as email, data transmissions, faxes and paging devices.

2. CALEA added the ability of carriers to innovate as a third interest to protect

In response to continued technological change (primarily in the area of wireless communications and vertical services such as speed dialing and call forwarding), Congress passed CALEA in order to both ensure that changing network design neither impeded interception nor retarded the introduction and dissemination of innovative communications services and technologies. Consequently, CALEA required telecommunications carriers to expeditiously isolate and deliver to law enforcement officials call content and call-identifying information reasonably available and to be able to accommodate a maximum number of simultaneous intercept requests.[24] At the same time, as stated in the legislative history of CALEA, the protection of the public's interest in continual innovation was a new element of concern to Congress in the area of lawful interception of communications.

"However, it became clear to the Committee…that a third concern now explicitly had to be added to the balance, namely the goal of ensuring that the telecommunications industry was not hindered in the rapid development and deployment of new services and technologies that continue to benefit and revolutionize society."[25]

3. Congress promoted innovation by exempting information services from CALEA and broadly defining their scope

Congress exempted information services from CALEA, stating that CALEA's capability requirements do not apply to information services.[26] Neither do CALEA requirements apply to any Internet service.[27] Congress adopted a broad definition of information services, incorporating elements of the Commission's *Computer II* definition of enhanced services,[28] and

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[24] 47 U.S.C. §§1002, 1003.

[25] H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N. 3489, 3492-3493 (*CALEA Legislative History*).

[26] 47 U.S.C. § 1002(b)(2).

[27] "…the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet….." *See*, *CALEA Legislative History* at 3503.

[28] The Commission defined an enhanced service as "any offering over the telecommunications network…[whereby] computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information." *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry*), *Final Decision*, 77 FCC 2d 384, 420 (1980) (*Computer II*).

the *MFJ's* definition of information services.[29] CALEA said information services:

> (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
>
> (B) includes –
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> (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
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> (ii) electronic publishing; and
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> (iii) electronic messaging services … .[30]

"Electronic messaging services" were in turn defined to mean:

> software-based services that enable the sharing of data, images, sound, writing or other information among computing devices controlled by the senders or recipients of the messages.[31]

The Commission subsequently determined that the MFJ's definition of information services, which was adopted into both CALEA and the Telecommunications Act of 1996,[32] encompassed and went beyond its Computer II definition of enhanced services.[33] Finally, Congress made the definitions of information and telecommunications services mutually exclusive, stating that the term telecommunications carrier "does not include persons or entities insofar as they are engaged

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[29] The *MFJ* defined information service as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications…" *See, United States v. Western Elec. Co*. 552 F. Supp. 131, 335 (D.D.C. 1982), Modification of Final Judgment, (*MFJ*).

[30] 47 U.S.C. § 1001(6)(B).

[31] 47 U.S.C. § 1001(4).

[32] 47 U.S.C. §153(20).

[33] 47 U.S.C. § 153(20),(46) (2003); *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21905, 21955-56 (1996) (*"Non-Accounting Safeguards Order*).

in providing information services."[34] By not allowing any overlap between information and telecommunications services, Congress reinforced the broad scope of the information services exemption and the narrow scope of the telecommunications obligation.[35]

4. Congress also promoted innovation by narrowly applying CALEA to telecommunications services

Congress also established a number of important provisions to ensure that telecommunications service providers' CALEA obligations would not hinder their ability to offer innovative telecommunications services. CALEA prohibited law enforcement agencies from requiring telecommunications carriers to adopt specific network design or equipment in order to comply with CALEA.[36] Telecommunications carriers would not have to comply with CALEA if compliance was not reasonably achievable and the Attorney General did not compensate them for their compliance-related investment costs.[37] Telecommunications carriers could obtain extensions of compliance deadlines if the Commission determined that compliance was not reasonably achievable by the date of a compliance deadline.[38] Telecommunications carriers could even introduce new services that were not CALEA compliant and would not have an enforcement action ruled against them in a court of law if alternate technologies or other carriers were reasonably available to handle the intercept request.[39] CALEA allowed

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[34] 47 U.S.C. § 1001(8)(C)(i).

[35] The Commission came to the same conclusion in its *1998 Report To Congress, & 13.*

[36] 47 U.S.C. § 1002(b).

[37] 47 U.S.C. § 1008(b).

[38] 47 U.S.C. § 1006(c).

[39] 47 U.S.C. § 1007(a)(1).

telecommunications carriers to establish standards that would serve as safe harbors for compliance with its capability requirements.[40] Finally, telecommunications carriers would not be required to decrypt information encrypted by their customers.[41]

C. Proper Statutory Construction Does Not Support Applying CALEA To Information Services

An agency lacks discretion to adopt a rule or decide an issue in a manner that contravenes the unambiguous meaning of a statute.[42] The meaning of a statute is determined using the "traditional tools of statutory construction,"[43] including examination of the statute's text, legislative history, and structure, as well as its purpose.[44] The Commission should utilize these traditional tools to evaluate *Petitioner's* proposals.

Because Petitioners incorrectly see a need to immediately apply CALEA to both Internet access and Internet-enabled voice applications, they are driven to argue that the statutory definitions of telecommunications service in CALEA sweep much broader than the Communications Act. Petitioners make four interpretations of statutory language and Commission decisions to justify making CALEA's application of the definition of

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[40] 47 U.S.C. § 1006(2).

[41] 47 U.S.C. § 1002(b)(3).

[42] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States Telecom Ass'n v. FCC*, __ F.3d __ (D.C. Cir. 2004), 2004 WL 374262 (reversing agency interpretation under *Chevron* step one); *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (same); *AT&T Corporation v. FCC*, 292 F.3d 808 (D.C. Cir. 2002) (same); *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (same); *National Public Radio Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (same); *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) (same).

[43] *Chevron*, 467 U.S. at 843 n. 9.

[44] *Chevron*, 467 U.S. at 843 n. 9; *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

telecommunications services to be much broader than the application of this definition under the Communications Act. Petitioners have misread both CALEA and Commission decisions.

1. Electronic communications may be telecommunications under the Communications Act

Petitioners first argue that CALEA's definition of "telecommunications carrier" is broader than that of the Communications Act because it refers to entities engaged in transmission or switching, not only of wire communications, but also electronic communications, which extends to signs, signals, writing, images, sounds, or data.[45] In contrast, the Communications Act defines telecommunications as the "transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of information as sent and received."[46] Petitioners imply that the reference to electronic communications, which goes beyond sound or voice to include data and images, necessarily includes a broader array of services than would be included under the telecommunications definition contained in the Communications Act. However, data and images transmitted without change in form or content and controlled by the user, and which were not created or modified using an information service, would be considered telecommunications under the Communications Act.

Under CALEA, only services remaining after information services have been identified may be considered in the set of telecommunications services. Under CALEA, telecommunications does not include "persons or entities insofar as they are engaged in providing information services."[47] If anything, CALEA's definition of information services is

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[45] *Petition* at 11.

[46] 47 U.S.C. § 3(43).

[47] 47 U.S.C. §1001(8)(C)(i)

broader than that of the Communications Act since it includes the same definition of information service, and adds enhanced services as well. Therefore, telecommunications according to CALEA cannot be broader than telecommunications under the Communications Act.[48]

2. Switched services may be telecommunications under the Communications Act

Petitioners next draw significance from the inclusion of the term "switching" in addition to transmission in CALEA's telecommunications definition, in contrast to the definition in the Communications Act, which refers to transmission but does not refer to switched services.[49] However, transmission is a generic term that may refer to access, switching, or transport. Obviously, there are switched telecommunications services subject to the Communications Act. Information services may also be switched, because they are services carried via telecommunications. For example, dialup Internet access providers may utilize ATM switches, modem banks, directory services, and content as part of Internet access. Therefore, the fact that a service uses a switch has no bearing on whether it is an information service or a telecommunications service under CALEA or the Communications Act.

3. CALEA excludes services that undergo change in form or content from being considered telecommunications

Petitioners also point to the absence of the phrase "without change in the form or content of information" in CALEA's definition of telecommunications.[50] Petitioners implicitly argue that by restricting telecommunications to transmissions that do not change form or content, the

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[48] Since the FCC's decision that enhanced services are incorporated into the broader category of information services, telecommunications under CALEA and the Communications Act are identical.

[49] *Petition* at 12

[50] *Id*., at 13.

Communications Act's definition of telecommunications must be more restrictive than CALEA's, and that services that undergo change in their form or content may be considered telecommunications services under CALEA. However, as discussed in subsection "1" immediately above, it is shown that CALEA's definition of information service controls the services that may be included in telecommunications. CALEA defines information services, in part, as services that include the ability to generate and transform information.[51] Therefore, by reference to 47 U.S.C. § 1001(8)(C)(i), telecommunications under CALEA cannot include services that undergo change in form or content.

4. The Commission has interpreted telecommunications and information services as being mutually exclusive under CALEA

Next, Petitioners use the Commission's "joint-use facilities decision" to imply CALEA obligations may be transferred to information services if they utilize the same facilities as telecommunications services.[52] They state that "the Commission ruled in the *CALEA Second Report and Order* that '[w]here facilities are used to provide both telecommunications and information services…such joint-use facilities are subject to CALEA." However, for, services carried on joint-use facilities, the Commission determined that only the telecommunications services, not the information services, were subject to CALEA. The complete text states that "[w]here facilities are used to provide both telecommunications and information services, however, such joint-use facilities are subject to CALEA *in order to ensure the ability to surveil*

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[51] 47 U.S.C. § 1001(6)(i).

[52] *Petition* at 14.

the telecommunications services.[53] Petitioners fail to include the italicized words in their quote. The Commission goes on to state that if the provider offers DSL over a facility, DSL service would be subject to CALEA, but once DSL is combined with an information service, the information service is not covered under CALEA ("the mere use of transmission facilities would not make the [information service] offering subject to CALEA as a telecommunications service").[54] Similarly, the Commission excluded cable television service from CALEA obligations, "even if delivered via the same transmission facility as other, covered services."[55]

After attempting to expand the definition of telecommunications beyond CALEA's statutory limits, Petitioners make several additional arguments in support of including Internet access and IP-based voice applications under the purview of CALEA.

5. Internet Access Is Not A Telecommunications Service

Petitioners ask the Commission to apply CALEA requirements to providers of broadband Internet access service, which they define as "both the process and the service used to gain access or connect to the public Internet using a connection based on packet mode technology that offers high bandwidth."[56] They first argue that Internet access has a telecommunications component, stating that in order to offer broadband access to the Internet, a "firm must engage in the transmission and/or switching of information…to and from its subscribers."[57]

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[53] *Communications Assistance for Law Enforcement Act, Second Report and Order* (*CALEA Second Report and Order*), 15 FCC Rcd 7105 (1999).

[54] *Id*. & 27.

[55] *Id*., & 17.

[56] *Petition* at 15

[57] *Id*., at 23.

MCI agrees that Internet access has a telecommunications component. In fact, all information services are defined, in part, as services offered via telecommunications.[58] For this reason, there is no meaningful distinction between broadband Internet access, narrowband Internet access or any other information service for purposes of CALEA. Were the Commission to utilize this rationale to apply CALEA obligations to broadband Internet access, information services providers would have no basis to abstain from bringing all their services into CALEA compliance. Such a decision would not be supported by the strict separation CALEA establishes between information services and telecommunications services.

Petitioners next suggest that the Commission may forbear from its decision in the *Cable Modem Declaratory Ruling* that Internet access is not a telecommunications service.[59] Petitioners misunderstand that decision. The Commission did not improperly deem Internet access to be an information service. Internet access is an information service according to the statutory definitions of information service in both CALEA and the Communications Act. Congress could not have been clearer that Internet access service is an information service and therefore excluded from CALEA requirements ("The definition of telecommunications carrier does not include persons or entities to the extent they are engaged in providing information services, such as …Internet service providers.")[60] Congress was not concerned that excluding Internet access services from CALEA obligations would hamper law enforcement's ability to conduct lawful intercepts, stating that "[while] the bill … does not impose prospectively

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[58] 47 U.S.C. § 1001(6)(A).

[59] *Petition* at 25.

[60] *CALEA Legislative History* at 3503.

functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception…. [They] are subject to interception under Title III just like other electronic communications.[61]

6. Petitioners offer no support for their claim that IP-Enabled service do not involve any change in form or content.

Petitioners assert, without discussion, that all forms of IP-Enabled voice do not involve any net change in form and content, and are therefore telecommunications services.[62] This assertion is contradicted by the Commission's nuanced presentation of various forms of IP-Enabled voice applications provided in its *1998 Report to Congress.* The report discussed the possibility of different regulatory treatments of different Internet-based voice applications.[63] It has also been contradicted by the recently released *IP-Enabled NPRM,* which identifies additional Internet-based voice applications such as gaming systems that have a voice component;[64] peer-to-peer applications such as Free World Dialup;[65] communications made available by providers such as Vonage who provide a software and non-phone customer premise equipment that transforms the form of communication between IP and time division multiplexed format required for terminating calls on the public switched telephone network;[66] and voice-

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[61] *Id*., 3503-3504.

[62] *Petition* at 30.

[63] *In re. Federal-State Joint Board on Universal Service*, 113 FCC Rcd 11501 (1998) (*1998 Report to Congress*), &&83-93.

[64] *IP-Enabled NPRM*, &10

[65] *Id*., &15

[66] *Id*., &15.

enhanced email and web browsing.[67] Moreover, the United States District Court for the District of Minnesota recently decided in *Vonage Holdings Corporation v. Minnesota Public Utilities Commission* that Vonage's IP-based voice application is an information service according to the Communications Act.[68] Similarly, the Commission recently decided that pulver.com's Free World Dialup service to be an unregulated information service.[69]

It is possible the Commission may decide that all of the above-mentioned applications are information services, or it may decide that some are telecommunications services and others are information services. The Commission has exhaustively identified the possible issues involved in distinguishing between different regulatory classifications for different IP-Enabled voice applications, and in so doing will lay a basis for a decision that will comply with the requirements of the Administrative Procedures Act to provide full notice to the public so as to build a complete record.

Petitioners invite the Commission to declare that broadband telephony is a telecommunications service, but were the Commission to follow their invitation, all IP-Enabled voice applications would immediately be classified as telecommunications services because Petitioners' definition is so broad.[70] The proper course for the Commission to take is to utilize

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[67] *Id*., &16.

[68] *Vonage Holdings Corp. v. Minnesota Pub. Serv. Comm'n.*, No. 03-5287, 2003 U.S. Dist LEXIS 18451 (D. Minn. Oct. 16, 2003) (Davis., J.)

[69] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecomunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27, (re. Feb. 1119, 2004).

[70] As discussed above, there is no statutory basis for considering the same service as telecommunications under CALEA and information under the Communications Act, except for the substantial replacement exception allowed under CALEA.

its *IP-Enabled NPRM* to definitively establish how to determine which, if any, IP-Enabled applications would be categorized as telecommunications services. If the Commission believes there is a need to bring some services found to be information services in the *IP-Enabled NPRM* under the purview of CALEA, it should subsequently issue a CALEA NPRM that lays a fully informed foundation for determining when non-telecommunications services will have replaced substantial portions of local exchange service, and whether it is in the interest of competition, innovation, and law enforcement to exercise Section 1001(8)(B) of CALEA with respect to those services.

7. There is no evidence that IP-enabled services have substantially replaced local exchange service

Petitioners also invite the Commission to determine that broadband Internet access and broadband Internet voice applications are subject to CALEA because they both comprise substantial replacements of local telephone services. Petitioners argue with regard to broadband Internet access that it has replaced "narrowband 'dial-up' Internet access.[71] This argument is inapposite. Assuming *arguendo* that broadband Internet access has replaced narrowband Internet access (and it has not), narrowband Internet access is not local telephone service.

Petitioners also simply assert that the Commission may bring broadband Internet voice applications under the purview of CALEA, but provide no evidence that IP-enabled voice services have substantially replaced local exchange service. Even Vonage, one of the largest IP-enabled voice service providers, currently serves fewer than 150,000 customers worldwide.[72]

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[71] *Petition* at 24.

[72] Vonage claims on its website to have "more than 125,000 customer's worldwide." See http://www.vonage.com/corporate/press_index.php?PR=2004_03_26_0.

Even if all of Vonage's customers were in the United States they would make up approximately approximately one percent of the 182.8 million local access lines that existed in the United States as of June 30, 2003.[73]

In addition to failing to offer any evidence of substantial replacement of local exchange service, Petitioners improperly ask the Commission to declare IP-enabled voice services to be substantial replacements for local exchange service without showing that it is in the public interest to make such a determination.[74] Congress intended that such a finding would be in the public interest only after considering whether it would promote competition, encourage the development of new technologies," in addition to protecting public safety and national security.[75]

In summary, the only manner in which services not considered telecommunications under the Communications Act might be considered telecommunications under CALEA would be subsequent to a determination by the Commission that a "service is a replacement for a substantial portion of the local telephone exchange service" and that it is in the public interest to deem such a service to be telecommunications under CALEA.[76] The Commission has yet to establish criteria to determine what would constitute a substantial replacement of local telephone exchange service; and whether inclusion of such services "would promote competition, encourage the development of new technologies, and protect public safety and national

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[73] FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2003* (Dec. 2003) at Table 1.

[74] 47 U.S.C. §1001(8)(B)(ii).

[75] *CALEA Legislative History* at 3501.

[76] 47 U.S.C. § 1001(8)(B)(ii).

security,"[77] has yet to develop a record whether any information services meet these various criteria; has yet to determine how many intercepts have been lost for failure to bring specific information services under CALEA's requirements; and has yet to examine whether CALEA compliance for these service(s) is reasonably achievable. Such determinations may only be made by the Commission after development of a full record, and are best done in the context of a rulemaking proceeding.[78]

IV. THE COMMISSION SHOULD PRESERVE CALEA'S BALANCE BETWEEN LAW ENFORCEMENT, PRIVACY, AND CARRIER INTERESTS

A. Introduction

Petitioners make numerous proposals for the Commission to include in a forthcoming Notice of Propose Rulemaking. The first set of proposals is ostensibly designed to resolve outstanding petitions for extension of time to comply with packet mode requirements for telecommunications services, but end up turning the Commission into an enforcing authority for CALEA compliance in contravention of Congress' intent to vest courts of law with compliance authority. It should not be included in the NPRM. The second set of proposals is designed to address standards setting and compliance with regard to future CALEA-covered services. These proposals also withdraw carriers' prerogatives to set capability standards and turn the Commission into an enforcing authority for CALEA compliance, again in contravention of Congress' intent to vest courts of law with compliance authority. It also contravenes Congress'

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[77] *CALEA Legislative History* at 3501.

[78] *PDRs* are appropriate vehicles for decisions where facts are not in dispute. ("A declaratory ruling may be used to resolve a controversy only if the facts are clearly developed and essentially undisputed.") *American Network, Inc*., 4 FCC Rcd 550, & 18 (1989); *See also*, *American Telephone and Telegraph Co*., 3 FCC Rcd 5071 (1988) (stating that a petition for declaratory ruling can be used as a substitute for a section 208 complaint if the facts are undisputed).

intent to vest carriers with the initial prerogative to determine whether new services comply with CALEA, as well as the Congressional recognition that some new telecommunications services offered by carriers may not need not to comply with CALEA. Because the Commission does not have enforcement authority, there is no need to include compliance benchmarks in the NPRM.

MCI will also recommend other issues to be included in the forthcoming NPRM, including: how to determine substantial replacement for local exchange service, how to weight public interest factors, and whether there are other examples of adding services to regulated programs that offer relevant lessons for CALEA.

B. Proposals Pertaining To Pending Extensions Should Not Be Included In An NPRM

1. Background

In May 1995, the Telecommunication Industry Association's (TIA) TR45.2 Subcommittee formed the Lawfully Authorized Electronic Surveillance (LAES) Ad Hoc Working Group in order to develop a technical electronic surveillance standard to serve as a safe harbor for complying with CALEA's capability requirements.[79] The standard, J-STD-25 ("J-Standard"), was published two and a half years later on December 8, 1997.

CALEA allows parties to petition the Commission to modify an industry standard if they believe it is deficient, and the Commission is then required to set capability requirements that are cost effective, protect privacy, minimize compliance cost, promote innovation, and provide a reasonable time to comply with the transition to any new standard.[80] The original J-Standard contained technical specifications for carriers to meet CALEA's capability requirements for packet mode communications. The packet mode component was questioned, but not formally challenged, by several privacy groups who maintained that the standard did not sufficiently separate call content from call identifying information for IP-based packet communications.[81] They proposed removing communications based on packet mode technologies from CALEA requirements until it was technically feasible to separate call content from call identifying information for all communications protocols.

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[79] 47 U.S.C. §1006(a)

[80] 47 U.S.C. § 1006(b)

[81] Connection oriented packet communications using ATM, Frame Relay, and X.25 were not challenged as deficient.

Although the Department of Justice and the Federal Bureau of Investigation challenged other aspects of this standard, they found the packet mode portion to be acceptable, and stated they could easily perform the necessary separation.[82] The Commission found that it was not technically feasible to cost-effectively perform separation for IP-based applications, found the packet mode component acceptable on an interim basis, and set a deadline of September 30, 2001 for carriers to be able to deliver telecommunications on this interim basis. Before that date was reached, the Commission allowed carriers to file for additional extensions of time to comply with packet mode requirements.[83]

In December 2003, both the Telecommunications Industry Association ("TIA") and the T1 committee of the Association for Telecommunications Industry Standards ("ATIS") adopted a revised packet mode standard for wireline voice, referred to as J-STD-25B. This standard incorporates' ATIS' T1.678 voice over packet for wireline communications standard, and supports lawfully authorized electronic surveillance for SIP and H.323 voice over packet protocols, the predominant protocols utilized by wireline providers to offer IP-enable voice communications. To date, no party has petitioned the Commission to find this standard deficient.

2. Industry packet mode efforts have been made in good faith

Petitioners make several complaints about industry packet mode compliance. They allege that industry rejected their standards recommendations.[84] They also contend there has

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[82] *Communications Assistance for Law Enforcement Act, Third Report and Order (CALEA Third Report and Order*), 15 FCC Rcd 7105 (1999), & 54.

[83] *In the Matter of Communications Assistance for Law Enforcement Act*, 16 FCC Rcd 17397 (2001), &17.

[84] *Petition* at 35.

been a vicious circle that validates continual extensions – a circle that begins with industry delay in implementing a packet mode standard, which delays vendor development of appropriate packet mode capabilities, which in turn, makes it seem reasonable for the Commission to approve extensions on the basis that compliance is not reasonably achievable.[85]

MCI respectfully submits that the truth is more complicated. Petitioners' recommendations during the deliberations leading up to the adoption of J-STD-25-B included a host of call identifying features that either went beyond existing CALEA requirements, were not reasonably achievable in an IP-environment, or explicitly applied to information services. These recommendations included: surveillance status, continuity check, information regarding the media utilized by the subject and a subject's associate, location reporting associated with SIP phones, call release information for SIP-based communications that take place behind a firewall, and replacement of call events with session events, and non-communications signaling, to name a few.[86] Industry attempted to explain that many of the desired features were not CALEA requirements or were not reasonably achievable. Rather than work with industry, Petitioners simply abandoned the TR45.2 LAES Ad Hoc Working Group.

On top of the technical challenges associated with separating call content from call identifying information for IP-based applications, all indications remain that IP-based voice applications have minimal take-rates compared to local exchange services, leading providers to conclude in good faith that there would be a substantial time period before Internet-based voice

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[85] *Petition* at 37.

[86] See generally, *Electronic Surveillance Needs for Carrier-Grade Voice over Packet (CGVoP) Service, Issue 1*, January 29, 2003, CALEA Implementation Unit, FBI; and *Electronic Surveillance Needs for Public IP Network Access Service (PIPNAS)*, Issue 1, September 30, 2003, CALEA Implementation Unit, FBI.

applications would be considered to be a substantial replacement for local exchange service, if ever. As IP-Enabled voice applications have improved, so have vendors' ability to supply equipment that will be CALEA-capable in the event these services are found to be a substantial replacement for local exchange service.

Since adoption of the J-STD-25-B, industry has initiated work on a "C" version of the standard, which would include many of the features desired by law enforcement as voluntary capabilities that could be made available, such as surveillance status, continuity check tone, feature status and non-communication signaling for information services. Law enforcement has not attended the meetings where these workplans were adopted.

3. Petitioner's proposal to restrict extensions would improperly vest the Commission with enforcement authority

Petitioners first seek to limit further extensions of the packet mode compliance date to fifteen months from the date of any Commission Order on this issue.[87] This goal may be achieved via the consultation the Commission would undoubtedly seek from the FBI as it reviews the most recent round of packet mode extension requests. There is no need for special rules regarding extensions, especially Petitioners' recommendation for the Commission to undertake enforcement actions against carriers for failing to meet compliance deadlines.[88] The Commission should bear in mind that it did not establish a packet mode standard or the conditions for compliance as allowed under CALEA.[89] No party formally challenged the packet mode component of the original J-Standard. Had this occurred, and had the Commission set

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[87] *Petition* at 48.

[88] *Id*., at 48.

[89] 47 U.S.C. § 1006(b)(5).

conditions for complying with a challenged standard, standards bodies and vendors would have had clear signals regarding required capabilities, and carriers would have either complied or had a concrete reference on which to base possible claims that compliance was not reasonably achievable. Instead, the Commission allowed, indeed was required to allow, the original J-Standard to remain in force for packet mode technologies. It still remains a valid standard for this purpose. Carriers should not be blamed for seeking extensions when the Commission has not determined the conditions for compliance to be included in a packet mode standard. Moreover, since the most recent round of extension requests were filed, the industry has adopted an unchallenged packet mode standard. In any case, once the Commission makes a decision regarding the length of such an extension, if an extension deadline is missed, any possible enforcement passes to the courts.[90]

Petitioners' true goal appears to be the transfer of enforcement from courts of law, as required by the statute, to the Commission. To list just a few of the recommendations, they seek to have the Commission require carriers to declare their compliance status, even if they have not filed an extension request with the Commission;[91] require carriers to file reports showing compliance progress;[92] dictate the level of detail in industry standards before they are adopted by carriers;[93] file an officer's certification confirming the carrier's vendors have developed intercept

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[90] 47 U.S.C. § 1007.

[91] *Petition* at 40.

[92] *Id*., at 41.

[93] *Id*., at 44.

solutions that implement the predetermined level of standard detail;[94] and have the Commission enforce deviations from these requirements.[95]

These proposals amount to an improper transfer of enforcement authority from the courts to the Commission, and should not be included in the forthcoming NPRM. Congress vested the courts with authority to determine whether carriers were in compliance with CALEA. Enforcement actions might be taken by a court after determining whether technologies were available to law enforcement, whether the facilities of another carrier were reasonably available to law enforcement; whether compliance could have been reasonable achieved through available technology; and the degree of delay the carrier engaged in by not adopting available technology, and other issues a court may deem appropriate.[96] All of Petitioners' declaration and benchmark proposals are designed to gather information regarding carrier the awareness of compliance deadlines; carrier communications with manufacturers; availability of technology; degree of carrier effort; and degree of carrier delay.[97] Petitioners propose establishing a regime whereby if benchmark deadlines are missed, then bad faith is established, and enforcement penalties would ensue. This is the sort of information a court would consider in any complaint proceeding, and shows that the gathering of this information and the enforcement actions proposed for the Commission belong to the courts, not the Commission.

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[94] *Id*., at 45.

[95] *Id*., at 47.

[96] 47 U.S.C. § 1007

[97] *See* e.g., *Petition*, fn 78.

C. Proposals Pertaining To Future CALEA-Covered Services Should Not Be Included In An NPRM

Petitioners propose a series of rules pertaining to future services that might be covered by CALEA. The Commission should refrain from adopting any rules pertaining to services before they are offered to the public. Petitioners ask the Commission to exercise its authority under Section 229(a) of the Communications Act to establish the same series of benchmark compliance rules they proposed should apply to pending extension requests.[98] Although Section 229(a) grants the Commission generic authority to implement rules governing CALEA, Congress expressly granted the courts authority to enforce compliance of CALEA. There is no need to include this issue in any forthcoming NPRM. Congress has already spoken.

Next Petitioners ask the Commission to adopt rules requiring new services to be CALEA compliant upon service initiation, and to require carriers who may be unsure whether a new service is CALEA compliant to "file a request of clarification or declaratory ruling" before being able to offer a service.[99] This request flies in the face of Congress' intent to place the initiative of implementing CALEA in the hands of carriers. Congress did this in order to prevent CALEA from impeding the deployment of new, innovative services. Petitioners' pre-approval proposal would surely impede technological innovation. Moreover, CALEA's legislative history explicitly prohibited law enforcement, or the Commission as its agent, from barring the

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[98] *Petition* at 53.

[99] *Id*., at 54.

deployment of new technologies, and for this reason should not be considered in any forthcoming NPRM.[100]

In addition, Congress generally expected new facilities to be able to comply with the capability requirements for any telecommunications services offered over those facilities. But Congress did not rule out the possibility that carriers would deploy facilities that could not be tapped if law enforcement had other means of achieving the needed surveillance. Congress left this decision up to carriers. Such a decision might result in law enforcement seeking enforcement of CALEA in a court of law, and the court would have discretion whether to require CALEA compliance or bar the introduction of the facility.

> "The bill establishes a reasonableness standard for compliance of carriers and manufacturers. Courts may order compliance and may bar the introduction of technology, but only if law enforcement has no other means reasonably available to conduct interception and if compliance with the standards is reasonably achievable through application of available technology….This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or features that could not be tapped….The legislation provides that the telecommunications industry itself shall decide how to implement law enforcement's requirements."[101]

For this reason too, there is no need to consider this issue in the forthcoming NPRM. Congress has already spoken to the manner in which new services may be introduced.

Petitioners also request the Commission adopt rules defining the enforcement actions against carries and equipment manufacturers that do not comply with CALEA.[102] MCI has already discussed above, that courts, not the Commission, have authority to enforce compliance

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[100] *CALEA Legislative History* at 3499 ("The bill expressly provides that law enforcement … may not bar introduction of new features and technologies…."

[101] *Id*., at 3499

[102] *Petition* at 58

with CALEA's capability or capacity requirements. It would be inappropriate to include this issue in the NPRM.

D. Any Forthcoming NPRM Should Be Limited To The Issue Of How To Determine Substantial Replacement For Local Telephone Service

As discussed in the sections responding to Petitioners' *PDR*, the only statutory basis that may be used to apply CALEA obligations to providers of information services, such as voice over IP providers, or Internet access providers, would be upon a determination by the Commission that "such service is a replacement for a substantial portion of local telephone service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier."[103] Any forthcoming NPRM should primarily focus on this issue. The Commission should call for comments on questions that will assist it to develop guidelines that would apply, not only to existing "candidate" services, but information services that have yet to be invented. In this manner, providers of such services will be afforded fair warning of the near-term possibility of gaining CALEA obligations, and will be able to better prepare for this possibility. The questions below are some the Commission should include in any forthcoming NPRM.

CALEA does not define "local telephone service."

- Should the Commission adopt the definition of local exchange carrier contained in the Communications Act?
- Is exchange service and exchange access included, or just exchange service?
- Must quality of service be comparable to existing local exchange service?
- Must it be a service available for a fee?
- Must it be made available on a stand-alone basis?
- Must it be made available on a common carrier basis?

CALEA does not define "substantial replacement"

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[103] 47 U.S.C. § 1001(8)(B).

- How should substantial replacement be defined?
- Is replacement different than substitution? Would second lines provided by IP-Enabled applications counted as a replacement?
- What specific measures of substantial replacement should be used?
- Should circuit switched lines lost be the benchmark?
- Should numbers of circuit switched customers lost be the benchmark?
- Should percent of households using the candidate service be the benchmark?

CALEA legislative history refers to substantial replacement within a state, but the Communications Act defines local telephone service at the level of the exchange.

- What is the Geographic Market?
- Exchange, City, State, Country, or Internationally?
- Should different IP-Enhanced services be defined according to different geographic markets?

The Commission has experience evaluating whether additional services qualify for subsidized treatment.

- Should the Commission draw lessons from other cases where additional services or carriers have qualified for regulatory treatment?
- What lessons may be learned from the Schools and Libraries Program?
- What lessons may be learned from the Rural Health Care Program?
- What lessons may be learned from the process of becoming an eligible telecommunications carrier?
- What lessons may be learned from considerations regarding additional universal supported services?
- What lessons may be learned from telecommunications relay service?

CALEA requires the Commission to factor the impact on competition, innovation, public safety and national security into its consideration.

- How should this be accomplished?
- How should these factors be weighted?
- How does the weighting affect the meaning of substantial replacement?
- Does weighting more towards law enforcement require the Commission to alter its finding in the CALEA Second Report and Order that "…it may be necessary to provide relief under section 109 only in unusual cases."[104]

[104] *CALEA Second Report and Order*, & 37.

V. CONCLUSION

For the reasons discussed above, the Commission should affirm the broad scope of the information services exception to CALEA. The Commission should not issue a declaratory ruling on the applicability of CALEA to broadband telephony and broadband access, but instead should consider this issue in any forthcoming rulemaking in order to ensure it has developed a complete record of evidence. Finally, the Commission should exclude from any rulemaking Petitioners' request to consider pre-approval for new services and Commission enforcement of service provider compliance with CALEA's capability requirements.

Sincerely,

/s/Larry Fenster

Larry Fenster
1133 19th St., NW
Washington, DC 20036
202-736-6513

Attachment 1

Virginia Indicts 2 Under Antispam Law
By SAUL HANSELL

New York Times
Published: December 12, 2003

Jeremy Jaynes, above, after his arrest in Raleigh, N.C., on felony charges of violating Virginia's new antispam law. Below, one of his Raleigh houses.

Virginia announced yesterday the indictments of two people on criminal charges involving unsolicited e-mail, the first case to be brought under an antispam law that took effect in June. Virginia is one of the few states with laws that include criminal penalties for sending unsolicited bulk e-mail, or spam.

Officials arrested Jeremy Jaynes, 29, at his home in Raleigh, N.C., yesterday morning. He was released on $100,000 bond, said Sam Currin, his lawyer, and is awaiting extradition to Loudoun County, Va., where he was indicted on Monday.

Prosecutors said that Mr. Jaynes also goes by the names Jeremy James and Gaven Stubberfield. The Spamhaus Project, a private group that assembles information on spammers, lists Gaven Stubberfield as the eighth most prolific distributor of spam in the world.

Similar charges were brought against Richard Rutowski of Cary, N.C. , in association with the same e-mail campaigns. Mr. Currin said that Mr. Rutowski was expected to surrender to authorities in Raleigh yesterday evening or this morning.

Each has been charged with four felony counts, each of which carries a maximum penalty of five years in prison, a $2,500 fine or both. The law allows such penalties only if the spam has fake return addresses, which prevent recipients from contacting the sender and asking to be removed from lists.

Prosecutors said that from July 11 to Aug. 9, more than 100,000 AOL subscribers clicked a "report spam" button to complain about messages supposedly sent by these two men. Prosecutors say that the defendants sent many times that number of messages to other AOL subscribers and to users of other Internet services. The e-mail messages, which had fake return addresses, contained information about stock-picking methods, mortgages and "Internet history eraser" software to delete evidence that a user had visited pornographic sites.

Mr. Currin said that he had just been hired by Mr. Jaynes and that he could not comment on the charges. Mr. Currin said that he did not represent Mr. Rutowski and that Mr. Rutowski did not yet have a lawyer. Mr. Rutowski could not be reached for comment.

Virginia investigators, with assistance from MCI, which provides connections to the Internet for AOL, traced unsolicited e-mail messages to accounts linked to the two defendants. The Virginia law applies to any mail sent through the state, and both AOL and MCI are based in Virginia.

Jerry Kilgore, Virginia's attorney general, said the state was exploring an action to force the defendants to forfeit any assets acquired as a result of the alleged spamming.

"This was a very profitable business for them," he said.

Spamhaus and several other antispam investigators say that the spammer known as Gaven Stubberfield is responsible for sending e-mail with graphic images promoting hard-core pornography.

Andy Sernovitz, the chief executive of GasPedal, an Internet marketing company, said that some people on GasPedal's e-mail address list received such mail when the address list fell into the hands of spammers, and that he traced some of the messages to Internet domains registered to a Gaven Stubberfield.

Carrie Cantrell, a spokeswoman for the attorney general, said that prosecutors did not find any pornography in the e-mail they linked to Mr. Rutowski and Mr. Jaynes.

Mr. Kilgore said that the case represented the first felony prosecution in the nation specifically using an antispam law. Earlier this year, New York State brought felony charges against Howard Carmack of Buffalo for suspected violations of the state's identity-theft laws. The state says he stole credit card numbers to pay for Internet accounts used to send spam. That case is scheduled for trial in January.

A federal antispam bill awaiting President Bush's signature would pre-empt state civil laws, but Mr. Kilgore said it would not pre-empt criminal fraud statutes like the Virginia law used in this case.

Statement of Verification

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 2004

/s/ Larry Fenster

Larry Fenster

CERTIFICATE OF SERVICE

I, Michelle Lopez, hereby certify that on this 12th day of April, 2004, copies of the foregoing were served regular mail or electronic mail on the following:

John G. Malcolm
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 2113
Washington, DC 20530

Patrick W. Kelley
Deputy General Counsel
Federal Bureau of Investigation
935 Pennsylvania Ave., N.W.
Washington, DC 20535

Robert T. Richardson
Deputy Chief Counsel
Office of Chief Counsel
Drug Enforcement Administration
Washington, D.C. 20537

Chairman Michael K. Powell
Federal Communications Commission
445 12th street, S.W.
Room 8-B201
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th street, S.W.
Room 8-A302
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th street, S.W.
Room 8-C302
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th street, S.W.
Room 8-B115
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th street, S.W.
Room 8-C723
Washington, D.C. 20554

Julius Knapp, Deputy Chief
Office of Engineering and Technology
Julius.Knapp@fcc.gov

John Rogovin, General Counsel
John.Rogovin@fcc.gov

William Maher, Chief
Wireline Competition Bureau
William.Maher@fcc.gov

John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
John.Muleta@fcc.gov

Geraldine Matisse
Office of Engineering and Technology

Geraldine.Matisse@fcc.gov

Julie Veach
Wireline Competition Bureau
Julie.Veach@fcc.gov

/s/Michelle Lopez
Michelle Lopez